Principles of Civil Law

Lecture Title: Law of Obligations (Part 1): Contracts

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Diploma in Law (Malta)

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Obligations

- Obligations which are not created by the mere operation of law, arise from:

1.**contracts**,

2. **quasi-contracts**: this is like a contract, however there are not the two consents; there is one consent and a presumed consent of the other party.

3. **torts**: there is no previous contract however the obligation results when when one causes harm to another. This gives rise to compensation, however in Malta, one has to prove fault. In some jurisdictions, there is a system of no-fault liable and so one must pay for the harm caused by him even if he not at fault.

4. **quasi-torts:** this relates to when a person is liable for damage caused by someone else. This is most typically seen in regards to minors.

Quasi-torts enters in both the civil law and the criminal law.

The two actions are separate. It may happen that one court finds the person guilty or responsible and the other does not: this mostly relates to the burden of proof. In criminal law guilt has to be established beyond reasonable doubt while in civil matters responsibility is assigned on a balance of probability. In criminal law the accused can remain silent if he chooses to but in civil law, the defendant may be forced to be put on the stand, even though he choses not to contest the case. Thus, different conclusions may result, and indeed result.

Classical examples would be:

1. Traffic Accidents
2. Injuries at the place of work

Is there pre-contractual liability in Malta?

Pre-contractual liability is essentially a German notion and invention.

The idea was that one is not liable, prior to giving consent, The German jurisdictions developed this notion, and today it takes into account that damage might result even pre-contract and pre-signing, mainly at the negotiation stage. In various Continental Codes like the Italian and the German Codes, there is the idea and that if a party disrupts negotiations without justifiable cause; he would be liable for damages.

However, this is not found in the French or Maltese Codes but French courts have accepted it,.

The position in Malta:

Giufrida v. Borg Olivier: 5th May 1967, Court of Appeal

Giufrida was an Italian company which wanted to build a hotel on Manuel Island and negotiations had started with the government. The negotiations were at an advanced stage. However, at some point the Maltese government stopped negotiations with Gufrida and started negotiations with another company. Giufrida sued to obtain an order from the Court to order the government to sign the contract. This plea was dismissed and the Court held that it cannot force anyone to enter into a contract since there was no promise of sale.

The Court of Appeal discovered that even before the change in the Italian Code, the Italian courts had accepted the idea of pre-contractual liability. The court did not give an answer as to whether it accepted pre-contractual liability because it quoted the author Renetti which said that if pre-contractual liability were to apply, it cannot apply against the government.

Today, both in France and in Italy, pre-contractual liability against the government has been accepted.

- Cassar v. Campbell Preston, 19th November 1971, Commercial Court

Cassar wanted to open a petrol station through BB Malta Ltd. and started negotiations with the company. BB Malta Ltd. stopped negotiations suddenly and Cassar sued for damages on pre-contractual liability. In this case the court bluntly said that pre-contractual liability does not apply because our courts follow the theory of volonta. The argument was that pre-contractual liability would be a discouragement to trade and that the idea should be that one is free to negotiate rather than hindering negotiations.

- Griscti v. Grech, 3rd April 1998, First Hall Civil Court

This is the first time that the court said that pre-contractual liability exists under certain terms. Grech appeared for Dhalia estate agency,, who wanted to find premises in B'Bugia. Dhalia did not have premises in B'Bugia so he contacted Grsicti who was a broker. Griscti started working and went into expenses in doing so. When Griscti found the premises, Dhalia told him that they had already found premises in B'Bugia and so did not need this one.

The court said that it would be prepared to accept pre-contractual liability under these conditions:

1. the person has incurred expenses in good faith with the expectation that agreement would be reached with the other party

2. the termination of the negotiations must be in bad faith

3. an advanced stage of negotiations must be a stage when there is an agreement on the essential conditions of the agreement – what is left is for the agreement to be put in writing

The court applied these 3 principles and said that the plaintiff had not managed to prove the case according to the conditions, especially the third one since there was not an advanced stage of negotiations. However, this judgment was a landmark one, as for the first time our Courts were willing to consider pre-contractual liability notion, subject to the satisfaction of these three requirements. The Court even went to state, what remedy it would grant; which it said would be the expenses but not the loss of future earnings.

1. Contracts

A contract is an agreement or an accord between two or more persons by which an obligation is created, regulated, or dissolved.

Creation of an obligation – example lease,
Regulation of an obligation – example a separation contract
Dissolved – a contract which dissolves debt after payment in full

Contract may be bilateral or unilateral.

A contract is bilateral when the contracting parties bind themselves mutually the one towards the other. It unilateral when one or more persons bind themselves towards one or more other persons without there being any obligation on the part of the latter.

When each of the parties undertakes an obligation, the contract is termed onerous. (example a sale contract)

When one of the parties gratuitously procures an advantage to the other, the contract is termed gratuitous (example a donation contract)

A contract is commutative, when each party binds himself to give or to do a thing which is considered as the equivalent of that which is given to or done for him.

What is required for a valid contract?

The following are the conditions essential to the validity of a contract:

(a) capacity of the parties to contract;

(b) the consent of the party who binds himself;

(c) a certain thing which constitutes the subject-matter of the contract;

(d) a lawful consideration.

All the four conditions need to be satisfied.

1. Capacity

All persons not being under a legal disability are capable of contracting. The following persons are incapable of contracting, in the cases specified by law:(a)minors;(b) persons interdicted or incapacitated; and(c) generally, all those to whom the law forbids certain contracts.

However the law does not define who has the use of reason or otherwise, and therefore this is a test which is left at the discretion of the Court.

The courts has recognised that there are cases where the person is generally insane but has lucid intervals. Thus, when the person does not have the use of reason, this must be at the moment of the conclusion of the contract. Thus it is not enough for the person to be proven to be habitually mad, it must be shown that he did not have the use of reason at the time of the contract. This is a rather heavy burden of proof. In practice health professionals are not very keen to give evidence in Court, and they are compelled to do so, they would not commit themselves.

Any contract entered into by a person who has not the use of reason, or is under the age of seven years is null.

Any obligation entered into by a child under the age of fourteen years is also null. Nevertheless, where the child has attained the age of nine years, the agreement shall be valid in so far as it relates to the obligations entered into by any other person in his favour. The same applies with respect to Minors between 14 and 18.

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Hammet v. Genovese (Commercial Court, 03 may 1993): Although the minor was under 18, he drove his own car, he carried out his own business activities, and he was engaged to carry out this business in discos. He bought some equipment through a contract, and after signing, he sought to annul same agreement because the sale was not to his advantage. The court dismissed the action because although at 16, the circumstances meant that the other party was justified in believing that he was of age.

Nonetheless a child who has attained the age of sixteen years may deposit money in an account opened by the child in his or her own name with any bank, and any money deposited in any such account may only be withdrawn by such child notwithstanding that such money may be subject to the administration, usufruct or authority of any other person. For all purposes of law the child shall with regard to the opening and operation of any such account be considered a major.

The disability of persons interdicted is either general in regard to all agreements, or special in regard to certain agreements only.

Persons capable of contracting may not set up the nullity of the contract on the ground of the disability of those with whom they have contracted.

2. Consent

Where consent has been given by **error**, or **extorted by violence** or procured by **fraud**, it shall not be valid.

The law does not define consent, it only says where it is missing.

Error

There are 2 types of error:

- *Error obsticle* which is an error which obstructs consent, which is subdivided in error in corpore or error in negotio. This gives rise the inexistence of the contract.
- Error nullite, the contract exists until it is rescinded by the effected party. This is an error in substantia.

Error in corpore is a mistake in the object of the contract. There is no contract because the consents have not met. *Error in negotio* is where there is a mistake regarding the type of agreement e.g. one wants sale the other wants lease. These two give rise to inexistence of the contract since this is absolute nullity and so anyone can raise the issue of inexistence, which is not dealt with in our Civil Code.

Error *in substantia* is an error in the substance of the object e.g. buying a ring you think is made of gold, which is in fact made of bronze. Here the contract is valid but it is relatively null.

The test which the Courts normally utilise, is the subjective test, that is, what did the particular person understand at the moment of signing? However this element of subjectivity is not absolute:

Borg v. Grima (03.06.94): Grima wanted to take a loan from the bank, and given the fact that the loan was not huge, the bank required a personal security. Grima contacted a third party (St. John) to see whether he would give personal security. Grima and St. John had a small business in its initial status and the latter stood as a personal guarantee for the loan. Grima did not pay back and the bank sued the guarantor in order to recover the amount. St. John pleaded that the guarantee was defected by reason of error. He said that he thought that he provided the bank with a specimen signature. Thus he claimed that he was mistaken. Even though the the Court did not say that St. John was lying, the mistake was not excusable. The court said that if this was a genuine mistake, it is still not excusable and so it cannot order the nullity of the contract.

- In *Zammit v. Fenech 04/03/2004* – the court refused to annul the contract on the fact that the person did not know how to read. The fact that one does not know how to write is not an excusable error. What is excusable or not has to be determined by the court.

- *Cassar v. Pace 1986* – The plaintiff bought a land rover with various accessories attached to it. After Cassar bought the car, he was stopped by the police and it resulted that that car with those accessories could not be driven on the road. Cassar filed an action to annul the contract. The question which the Court had to study was what was the substance of the contract? The Court held that Cassar bought the land rover because of the accessories and the way it was modified. The Court cancelled the sale because the substance is subjective and unilateral.

Violence

The use of violence against the obligor is a cause of nullity, even if such violence is practised by a person other than the obligee.

Violence must be:

- Unjust
- Grave
- Determining

Unjust: the violence must be unjust and thus it does not apply if the threat is just i.e. performing an action something which is a right. It must not apply where a threat is a just threat (e.g. threat to report the matter to the police).

Euro Bridge Shipping Services Ltd v. Scicluna 30/04/2001

The plaintiff was engaged by defendant to get material from abroad. The company delivered the goods to defendant. On some occasions Scicluna had paid via a cheque, however at times payment was not effected due to insufficient funds at the bank.. The plaintiff signed the bills of exchange to get the product. Scicluna still did not pay and the company took the matter to court. Defendant raised the nullity of the bills of exchange because he signed them under a threat. The court dismissed his plea. The Court held that there was no unjust threat because Scicluna had defaulted his payments in the past. The plaintiff had used its rights, and therefore there was no basis to annul the bills of exchange.

Economic duress does not amount to violence. There have been cases where the person argued that they were forced to sign the contract because of their economic situation. The courts have always held that this is not a ground for the annulment of a contract.

Camilleri v. Vella Court of Appeal, 9th June 2003:

This was the case of an old woman where she claimed that her consent was vitiated because of violence practiced against her. The Court held that there was real violence against her even though during the negotiations there was a lot of shouting and banging and she was an old woman. The court said that this does not amount to violence.

Borg v. Dolphin Supermarkets Ltd. First Hall Civil Court, 13th June 2003:

Similarly, there was the claim that there was a lot of shouting and calling names during negotiations, however, there were no physical threats. The court said that this does not amount to a threat in terms of the law and so does not amount to violence.

Violence is a ground of nullity of a contract even where the threat is directed against the person or the property of the spouse, or of a descendant or an ascendant of the contracting party.

Where the threat is directed against the person or property of other persons, it shall be in the discretion of the court, according to the circumstances of the case, to void the contract or to affirm its validity.

Mere reverential fear towards any one of the parents or other ascendants or towards one's spouse, shall not be sufficient to invalidate a contract, if no violence has been used.

Fraud

Fraud is the third vice of consent.

Generally when there is fraud there is error and usually one makes an action on both fraud and error. Error is unilateral and does not depend on fraud, while error as a result of fraud needs the participation of the other. The requirements of fraud, as accepted by the courts are:

- Intention to deceive the other party
- The fraud must be grave
- The fraud must be determining
- The fraud must have taken place with the participation, active or passive, of the other party (not third party)

There must be shown intention to deceive on the part of the other party. Thus one must always prove that the intention to deceive on the part of the other party was there and it was not a mere mistake. If one genuinely made a mistake, there cannot be deception. This largely emerges from the facts of the case because one cannot prove a state of mind.

Fraud shall be a cause of nullity of the agreement when the artifices practised by one of the parties were such that without them the other party would not have contracted.

Fraud is not presumed but must be proved.

The question always remains: how to prove fraud?

The fraud must be grave such as to overcome the good faith of the other party. What the Courts have generally held to be the tricks of the trade (e.g. a seller saying that his products are the best) are not deemed to be fraudulent because these are expected. The court expects that the person must make his own judgments. What the courts have sometimes said is that the other party should not believe everything that the other party says.

Germani Mifsud v. Bonnici Court of Appeal 4th June 1910:

The law will protect he who protects himself. Every prudent man should before entering into contract take the necessary precautions in his interest. If he does not take these precautions then the law will not give him protection or defense.

- Cauchi v. Borg Court of Appeal 11th June 1992

The tenant was an old woman and she requested the landlord to make the necessary repairs. Under the old laws, the landlord was obliged to make structural repairs. At the time the rent was controlled and so it was minimal. Thus the landlord found himself in a very difficult position. He offered to sell the house instead to his tenant who agreed to buy it at a very small amount. She threatened that if the landlord did not make the repairs or sold her the house at Lm2,500, she would get her niece to move in with her. Thus the landlord agreed to sell the house for Lm2,500. Subsequently he discovered that the niece had no intention of moving in with her grandmother and therefore the landlord brought this action on the ground of fraud because he was deceived into selling. The court dismissed the action and said that the fraud was not serious because these are tricks that are to be expected in a commercial transaction and that it is expected that the tenant would try to maximise her position.

- Galea v. Borg Magistrate's Court of Gozo, 11th July 2008:

This case dealt with the question, whether not disclosing important infromation amounts to fraud.

Can one deceive someone by not saying something? The Court held that the position has always been that there is no *a priori* answer and this depends on the case. If one decided not to disclose important information, this could amount to fraud.

The principles of French law say that failure to disclose a matter which the other party has an interest in knowing and about which the latter would have difficulty in finding upon himself, this constitutes fraud. This is tied to the notion that contracts must be entered into in good faith.

How does consent create a contract?

A contract requires two consents, therefore, one consent cannot create a contract. One cannot consider an obligation with just one consent. A unilateral consent can never crate an obligation. There must be an offer and an acceptance, and when these two meet, and then there is the contract.

The process of consent can be dissected in four stages:

- Consent must exist internally
- It must be extremely manifested
- There must be an identity between the acts of volition of the contracting parties
- There must exist the concourse of these acts of volition – the two consents meet, and this creates the obligation.

Simulated Contracts

For instance, when the parties want to create a donation, but give the contract the impression of sale. This tends to occur in cases where the parents prefer a particular child within the family unit.

Simulation can be:

- Absolute – when one does not want to contract but enters in the contract for some other purpose. Thus an impression of the contract is given. Thus the intention is that the person does not want to change his juridical position. This often occurs in separation problems to avoid the issue of the community if the acquests and maintenance.
- Relative - when the person wants to contract, but gives it the appearance of another type of contract

The rule is that the truth and reality prevails over the appearance.

Simulated contracts can be attacked by any interested party who has in the interest in the alleged simulated contract. In such a scenario, the Court has to examine and identify the true intention of the parties when they entered in the contract. There is no need to prove the intention to defraud, as long at there is the discrepancy between the intention and the manifestation of the consent. However, in many cases of simulation there would be an intention to defraud.

Raciti v. Azzopardi, First Hall Civil Court, 3.11.05: A couple was engaged, and the woman was not working. They needed to take a loan to buy a house, and since she was not working, the bank did not want to give a loan to her and the bank insisted that the contract be made only in his regards. However the sale price was incurred 50-50 by both of them. The intention was that the house belongs to both but the contract was signed by the man. Eventually the couple married and after underwent separation proceedings. The husband claimed that the house is a paraphernal property and thus belongs only to him. He argued that all the wife was entitled was that the money she had spent but not half the value of the house. The woman wanted the half share of the value of the house. The action brought forward by the wife was that of simulation of contract. The Wife managed to prove that the intention of the parties when signing was that the property would be the property of both, and the Court held that the house belonged to both parties even though the contract was made in the name of the husband.

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Subject-Matter of Contracts

Every contract has for its subject-matter a thing which one of the contracting parties binds himself to give, or to do, or not to do.

The subject of an obligation must be a thing determinate, at least as to its species.

Future things can form the subject of a contract. Nevertheless, it shall not be lawful to renounce a succession not yet devolved, or to make any stipulation with regard to any such succession, whether with the person whose succession is concerned, or with any other person, even though with the consent of the former.

Therefore the subject matter of the contract shall be an object which:

- Is Possible: things which are impossible may not be subject to a contract
- Lawful: things prohibited by law or contrary to morality and public policy are prohibited. The most controversial is morality because this is not defined in the law. The Law says that stipulations *quate litis* are void. These refer to the services of a lawyer in a litigation: a lawyer cannot establish his fee on a percentage of his winnings. This is not permitted. Interests higher than 8% are illegal and therefore cannot be part of a contract.
- In commercio: this is a Roman notion where an object which is an extra commercium cannot form the object of contract e.g. slaves, organs, public property, property belonging to the government which is in a public domain.

The government can regulate the forshore, but he cannot sell it. This follows Roman Law principle. (COA 27/03/2009: the court quoted from Laurent which bases himself on Roman law, whereby the Court held that the foreshore belongs to the public domain.)

- Specified

The object must be specified i.e. the agreement must clearly identify the object of the contract.

For instance, a promise of sale was declared null because it was a promise of sale with respect to an apartment in a block of flats. The court declared such promise of sale null because the object was not specified.

It is also possible for the parties to agree on the means on how to specify the object. Thus, it could be that the object is not specified in the agreement but the agreement must provide a means of how to identify the object.

- An obligation without a consideration, or founded on a false or an unlawful consideration, shall have no effect.

- Consideration may be proved although it is not stated. The agreement shall, nevertheless, be valid, if it is made to appear that such agreement was founded on a sufficient consideration, even though such consideration was not stated.

- Where the consideration stated is false, the agreement may, nevertheless, be upheld, if another consideration is proved.

- The consideration is unlawful if it is prohibited by law or contrary to morality or to public policy.

- Where the consideration for which a thing has been promised is unlawful only in regard to the obligee, any thing which may have been given for the performance of the contract, may be recovered. If the consideration is unlawful in regard to both contracting parties neither of them, unless he is a minor, may recover the thing which he may have given to the other party.

What is an unlawful consideration?

An example would giving loans illegally, as one requires a license.

In a particular case, the court said that the creditor did break the law in lending money without having a license in place, however the *causa* is the loan, which was for a lawful purpose and so the loan is not tainted with legality and must be paid.

Another case was a person who worked as an electrician without a license, and was engaged to do works. He carried out works in a house and was not paid and so sued. The party who received the services did not pay and he argued that he could not be forced to pay for illegal activity. The court upheld this argument and held that one cannot be compelled to pay for services rendered services against the law, even though the service was good.

Anything that is against the law cannot be the object of a contract. This includes something which is against a MEPA permit. There have been cases where a contract of sale was annulled because the property was not subject to a building permit.

- Pisani v. Mifsud First Hall Civil Court, 10/10/05: the Court accepted that if one sells property without the proper permit that amounts to fraud.
- Axiaq v. Galea, Court of Gozo, 02/05/08: Court confirmed the principle that property should be covered by a permit.
- Vella v. Fenech, 29/08/90: A property without a proper permit is an unlawful object. The court also referred to Giorgi, saying that if the object is in violation of any law, then it is considered to be unlawful and so cannot form the object of a contract.

Property not built according to the permit is subject to a notice and technically it may be pulled down. Since there is a possibility, it is something certainly against the law and so that sale of property would be unlawful.

Sammut v. Castille Hotel Ltd First Hall Civil Court 6th July 2005

Sammut was dismissed and sued for unjustified dismissal and compensation. Sammut claimed the payment of his wage which was regular and on the books, as well as the extra payment was unofficial and undeclared to the Government. The Court held that the illegality has to be ignored and payment was given only and solely with respect to the the declared payment.

Luchesi v. Sultana Court of Appeal 3/12/04

Prior to the accession in the EU, foreigners needed a permit from the Ministry of Finance in order to buy a house in Malta. The Minister usually gave permission for the purchase of the first house. The family already had a house un Malta, but wanted a second property. The family, knowing that the permit was unlikely not going to be issued, agreed with a Maltese person to buy the property on their behalf. The parties fell out and the Maltese person refused to transfer the property to the foreigners. The foreigners sued for an order to have the property transferred in their name. The court held that the whole idea is illegal, the transaction was prohibited by law as the transfer was made without the permit of the Minister. The Court refused the case, as this was an illegal act.

Bonnet v. Borg, Court of Appeal 6.10.99

Borg exercised the service of giving loans, without having the license for doing so, however he did not charge more than 8%. Bonnet had borrowed some money from Borg and eventually he tried to annul the agreement through the Court on the basis of an illegal cause. The Court held that the loan had to be paid back, while ordering the Commissioner of police to take an action. In this case, the court detached the obligation of the loan from the illegal cause.

Against Public Policy

Aveta v. Ecoralla 30th June 1936 – The Court was asked to study, a cartel agreement, that cars will not be sold less than an agreed price. The court held that the agreement was illegal as it was against public policy.

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Portelli v. Bagley Court of Appeal 21.3.1998 and Bonello v. Borg First Hall Civil Court 14.7.1997

These cases involved foreigners and under the law as it was, the lease also required a permit from the competent authority. Property was given on lease without the permit. The agreement was signed and the foreigner moved in. However, in both cases the tenement did not pay the agreed rent. The court was asked to decide the case and pointed out that the lease was prohibited by law, and no rent was ordered to be given.

In the Bonello case, the tenant not only did not give the rent, but also caused damages to the tenement before the end of the lease. The Court however did give compensation to the lessor, as the fact that he caused harm to the premise, there is no illegal causa as this is independent of the illegal lease agreement.

Is one still bound to pay for a service not utilised, despite a valid contract in place?

Sommers v. Fountain, Magistrate's court, 4th June 1980:

Sommers was the head nun of the Blue Sisters Hospital which was a private hospital. Fountain and his wife booked a room for the birth of their baby however when the due date approached they decided to go to the government hospital. Sommers sued for use of the room. Fountain raised the plea that there was no cause of the contract because they did not make use of the room. The court said that there is a causa, the room was booked and kept available and the fact that this was not used does impinge on the validity of the contract. Thus there was a causa and so they had to pay.

- Ellis v. Testa (15/12/03) (St. Edwards College case)

Parents book their children for the school, however, they change their mind and send their children elsewhere. The school sued for the term that the child would have attended as this was reserved. The parents claimed lack of causa since the school did not educate the child. The court however said that a place was kept for the child in that school, the fact that they did not make use of the placement does not mean that they were not to pay. St. Edward's College also sued for the costs related to food but the court only gave them compensation for one week of food, because the school certainly did not buy food for one year, upon realizing that child would not be attending.

Prohibition of Clauses in Contracts

Reference be made to the Consumer Affairs Act, Chapter 378 of the Laws of Malta. The law established conditions and terms which are deemed to be unfair term. Any such term found in the courts should be ignored by the courts. The court has the faculty to ignore a term and not canceling the contract.

If a consumer contract have any term from the below, it shall shall be deemed never to have been so inserted.

Article 44, enlists such unfair terms, which include the below:

a) excluding or limiting the liability of a trader by reason of his own fraud or gross negligence or that of his employees or agents, or by reason of any failure to fulfil an obligation constituting one of the fundamental elements of the contract;

b) establishing an unreasonably short period for notifying the trader of any defects;

c) excluding or limiting the legal rights of a consumer against the trader in the event of total or partial non-performance or inadequate performance by the trader of any of his contractual obligations;

d) prohibiting the consumer from offsetting a debt owed to the trader against a claim which the consumer may have against the same trader

e) making an agreement binding on the consumer whereas the provision of services or goods by the trader is subject to a condition whose realisation depends solely on the will of the trader;

(f) allowing the trader to retain sums paid by the consumer if the consumer decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the trader where the trader is the party cancelling the contract;

(g) requiring a consumer who fails to fulfil his obligation, to pay to the trader as compensation a sum which is disproportionately high to the value of the goods or services purchased or hired;

(h) determining the compensation payable by a consumer who fails to fulfil his obligations, without providing for compensation of the same magnitude by the trader who fails to fulfil his;

(i) limiting the means of proof which the consumer can use;

(j) causing the consumer causing the consumer to waive any ground of claim against the trader in the event of a dispute;

(k) prohibiting the consumer from seeking the cancellation of the contract if the trader fails to fulfil his obligations

- F. Advertising Ltd. v. Tabone Court of Appeal, Inferior Jurisdiction 9/1/2009:
- Three principles were laid down with respect to Article 45 of the Consumer Affairs Act:

1. Whether an expression was fair or not must be determined objectively and independent of the will of the parties – the court has to examine the clause objectively and the court will annul the contract ignoring the intention of the parties
2. The list in section 45 is not an exhaustive list and the court can find other unfair terms
3. The unfairness of the particular clause can be raised as a defense in a particular case. The consumer need not bring an *ad hoc* action to deem the clause unfair and attack the contract. If the trader is brining an action to enforce a contract, the consumer can utilise Article 45 without brining an action for annulling the contract.

- This shows how the law is interfering in the will of the parties and annulling certain contracts. Another way is where the law in certain contracts allows a cooling off period. Despite the fact that contracts are law for the parties, the legislator had provided to certain persons to opt out form the contract even though the contract is valid. This is done for the protection of the weaker party.
- The law goes into other detail, such as, a deposit when purchasing property cannot be more than 10% and it must not be paid before the lapse of 15 days.
- In the tourist industry, when a person buys a time-share, the Malta Travel and Tourism Services Act gives 10 days in order to cancel the time-share agreement. These 10 days are ten working days.

Effects of Contracts

Contracts legally entered into shall have the force of law for the contracting parties.

They may only be revoked by mutual consent of the parties, or on grounds allowed by law.

Contracts must be carried out in good faith, and shall be binding not only in regard to the matter therein expressed, but also in regard to any consequence which, by equity, custom, or law, is incidental to the obligation, according to its nature.

Justice Philip Sciberras had extended this principle of good faith and said that even in the negotiation stage parties must act in good faith and shall be binding not only in regard to the matter expressed in the contract but also anything that is incidental to the obligation is also considered to be part of the contract.

contracts shall be operative between the contracting parties and shall not create a prejudice to third parties. As regards third parties, a contract is *a res inter alios acta*, which means that the contact is a thing which does not prejudice a third party.

Every person shall be deemed to have promised or stipulated for himself, for his heirs and for the persons claiming through or under him, unless the contrary is expressly established by law, or agreed upon between the parties, or appears from the nature of the agreement.

A person cannot by a contract entered into in his own name bind or stipulate for any one but himself.

Contracts shall only be operative as between the contracting parties, and shall not be of prejudice or advantage to third parties except in the cases established by law.

It shall also be lawful for a person to stipulate for the benefit of a third party, when such stipulation constitutes the mode or condition of a stipulation made by him for his own benefit, or of a donation or grant made by him to others; and the person who has made any such stipulation may not revoke it, if the third party has signified his intention to avail himself thereof.

Difesa v. HSBC Life Assurance (Malta Ltd.):

The Husband was a prison warden and the management of the prison authority had provided a life insurance with the defendant. The contract was signed by the prison authorities and HSBC Life Assurance (Malta Ltd.) One man died and the heirs did not get compensation. The argument of the insurance company was that the warden was not a party to the contract. The court said that it was clear that this was a case of a contract creating in favor of a third party. It was clear that the warden had known about the contract, in fact he had paid part of the premium. Thus the heirs had a direct action to enforce the contract without involving the prison authorities in the case.

Interpreting Contracts

The general rule is that an oral consent is enough to create an obligation, however there are certain instances where the law requires a private writing or a public deed.

Difference between private writing and public deed

- Registration
- Effect on Third Parties
- Lawyer / Notary / Individuals

It is important that the date and the signatures are done by hand.

The rule is that where a public deed is required by law, this cannot be a private writing. However, where a private writing is sufficient, the creation of a public deed does not make it null. For instance, in the case of a konvenju where a private writing is enough but in some cases the parties insist on a public deed. If in such case, the public deed is not valid.

Private writing

A private writing is an instrument which is signed by two parties to the agreement, the signatures need not be witnessed a lawyer or a notary, all that is needed is that the document is signed by 2 parties. The date is also not essential for the validity of the writing. However, these are essential if the matter goes to court because witnesses and dates would facilitate matters in case of litigation, with regards to prescription for instance, however they are not essential elements and so are not required for validity.

Would possession satisfy the signature? In Spiteri v. Buhagiar 20/01/61, the court held that the material possession of the writing in the hands of the party who failed to sign it could not supply the requirement of actual signature which is required by law

Where, by giving to the words of an agreement the meaning attached to them by usage at the time of the agreement, the terms of such agreement are clear, there shall be no room for interpretation.

Where the literal meaning differs from the common intention of the parties as clearly evidenced by the whole of the agreement, preference shall be given to the intention of the parties.

Words susceptible of two meanings shall be taken in the meaning which is more consistent with the subject-matter of the contract.

Whatever is ambiguous shall be interpreted according to the usage of the place where the contract is mad

What if one party does not know how to sign?

The law provides for a procedure: it is not enough that one signs with a mark, this must be done in front of 2 witnesses, a notary or a lawyer and if the signature is not authenticated in this way, then there is no signature and so no contract. The notary must make the declaration relating to this in the contract.

In Zarb v. Pullicino 28/03/88: the court said that unless the signature (in case where it is a mark) is not authenticated as required by law, is not a signature and so there is no contract.

What if there are two separate documents?

The court said in Vella v. Cassar 24/03/67: that where the law required that an obligation has to be in writing, this must be signed by both parties on the same document, even if not on the same day. Thus it must be the same document. In this same case there was also the issue of whether exchange of correspondence amounts to a private writing. The court said that his does not give rise to a private writing. The court insisted that a private writing is a document having all terms of the agreement and signed by both parties.

Obligations which require a public deed or a private writing

The transactions hereunder mentioned shall on pain of nullity be expressed in a public deed or a private writing:

(a) any agreement implying a promise to transfer or acquire, under whatsoever title, the ownership of immovable property, or any other right over such property;

(b) any promise of a loan for consumption or mutuum;

(c) any suretyship;

(d) any compromise;

(e) any civil partnership;

(f) for the purposes of the Promises of Marriage Law, any promise, contract, or agreement therein referred to.

21 ACADEMY

Diploma in Law (Malta)

CAMILLERI PREZIOSI